

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

1  
2 Jan 09, 2025  
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SEAN F. McAVOY, CLERK

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12 UNITED STATES DISTRICT COURT  
13 EASTERN DISTRICT OF WASHINGTON

13 CANDACE B.,<sup>1</sup>

No. 4:24-cv-05073-EFS

14 v.  
15 Plaintiff,

16 CAROLYN COLVIN, Acting  
17 Commissioner of Social Security,<sup>2</sup>  
18 Defendant.

**ORDER REVERSING THE ALJ'S  
DENIAL OF BENEFITS, AND  
REMANDING FOR FURTHER  
PROCEEDINGS**

19 Due to Mitchell's disease (erythromelalgia), high blood pressure, arthritis,

20 Raynaud's disease, headaches, nausea, depression, anxiety, and insomnia, Plaintiff

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<sup>1</sup> For privacy reasons, Plaintiff is referred to by first name and last initial or as  
“Plaintiff.” See LCivR 5.2(c).

<sup>2</sup> Carolyn Colvin became the Acting Commissioner of Social Security on November  
30, 2024. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, and section  
205(g) of the Social Security Act, 42 U.S.C. § 405(g), she is hereby substituted for  
Martin O’Malley as the defendant.

1 Candace B. claims that she is unable to work fulltime and applied for disability  
2 insurance benefits.<sup>3</sup> She appeals the second and most recent denial of benefits by  
3 the Administrative Law Judge (ALJ) on the grounds that the ALJ violated this  
4 Court's prior remand order, made an error at step two when he found that her  
5 medically determinable impairments were nonsevere, improperly evaluated the  
6 medical opinion evidence, improperly discounted the third-party witness  
7 statements, improperly assessed Plaintiff's credibility, and improperly relied on the  
8 medical expert testimony of Dr. Frye. As is explained below, the ALJ erred. This  
9 matter is remanded for further proceedings.

10 **I. Background**

11 In February 2019, Plaintiff filed applications for benefits under Title 2 and  
12 Title 16, claiming disability beginning October 1, 2013, based on the physical and  
13 mental impairments noted above.<sup>4</sup>

14 The agency found on December 16, 2019, that for purposes of the Title 16  
15 claim, Plaintiff was rated to less than sedentary work and allowed benefits.<sup>5</sup> The  
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18 <sup>3</sup> At the Reconsideration level, Plaintiff was found to be disabled on a date later than  
19 the date last insured and is eligible for and receiving Supplemental Security Income  
20 Benefits under Title 16.

21 <sup>4</sup> AR 196-211, 212-215, 237.

22 <sup>5</sup> AR 96.

1 agency denied the Title 2 claim at both the initial and reconsideration levels.<sup>6</sup> After  
2 the agency denied Plaintiff benefits, Plaintiff appeared on March 11, 2021, with her  
3 attorney for a hearing before ALJ Marie Palachuk.<sup>7</sup> Plaintiff testified and a  
4 vocational expert appeared for the hearing but did not testify.<sup>8</sup>

5 Plaintiff testified that she stopped working as an office manager in October  
6 2013, primarily because her feet “were burning very badly every day . . .  
7 sometimes, for just a little bit. Sometimes, all day.”<sup>9</sup> She said she was limited to  
8 standing for no more than 15 minutes at a time or she would go into “full flare.”<sup>10</sup>  
9 She further testified to having burning pain in her fingers during the relevant  
10 period, and she described how her symptoms affected her job performance and  
11 sleep.<sup>11</sup> Plaintiff said that as bad as her symptoms were from 2013 to 2015, they  
12 had progressively worsened since.<sup>12</sup> Plaintiff also explained her sparse medical  
13 history prior to 2016. When she first quit her job in 2013, she intended to simply

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16 <sup>6</sup> AR 105-111, 123-129.

17 <sup>7</sup> AR 40-58.

18 <sup>8</sup> *Id.*

19 <sup>9</sup> AR 45.

20 <sup>10</sup> AR 46.

21 <sup>11</sup> AR 45, 48-49.

22 <sup>12</sup> AR 52, 57.

1 rest and “regroup” so that she could return to work.<sup>13</sup> Then, for about two years,  
2 Plaintiff lacked insurance and could not afford treatment. Finally, even when she  
3 gained insurance through her husband near the end of 2015, Plaintiff’s doctors  
4 “couldn’t figure out what it was, and there was—there was nobody in—in [her]  
5 network, a specialist at that time, to send [her] to.”<sup>14</sup> It was not until 2018 that  
6 Plaintiff’s physicians reached the diagnosis of erythromelalgia.

7 On March 31, 2021, ALJ Palachuk issued an unfavorable decision.<sup>15</sup> Plaintiff  
8 filed a timely request for review and on August 31, 2021, the Appeals Council  
9 denied review.<sup>16</sup> Plaintiff then appealed to this Court.

10 On March 6, 2023, this Court remanded the case to the Commissioner with  
11 specific direction that the ALJ 1) obtain medical expert testimony regarding the  
12 nature and progression of Plaintiff’s impairments; 2) determine at step two the  
13 date on which Plaintiff became disabled; 3) consider the lay statements of  
14 Plaintiff’s former employer and co-worker, and not rely upon the mere absence of  
15 medical evidence in the record to reject their testimony; 4) meaningfully articulate  
16 her analysis of the supportability and consistency of each medical opinion; and 5)  
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19 <sup>13</sup> AR 50

20 <sup>14</sup> AR 51.

21 <sup>15</sup> AR 17-31.

22 <sup>16</sup> AR 1-6.

1 further develop the record if necessary.<sup>17</sup>

2 On February 29, 2024, Plaintiff's attorney attended a hearing before ALJ  
3 Palachuk.<sup>18</sup> Plaintiff did not appear but a medical expert, Dr. Frey, and a  
4 vocational expert appeared and testified.<sup>19</sup> On April 22, 2024, ALJ Palachuk issued  
5 an unfavorable decision.<sup>20</sup> The ALJ found Plaintiff's alleged symptoms were not  
6 entirely consistent with the medical evidence and the other evidence.<sup>21</sup> As to  
7 medical opinions, the ALJ found:

- 8 • The opinions of state agency consultant J.D. Fitterer, MD, persuasive.
- 9 • The opinions of state agency consultant Howard Platter, MD, not  
10 persuasive.
- 11 • The opinions of Sudeep Thapa, MD, not persuasive.
- 12 • The opinions of Brent Thielges, DPM, not persuasive
- 13 • The opinions of medical expert Lauren Frey, MD, persuasive.<sup>22</sup>

14 She also found the third-party statements from Johanna Merritt and Teresa

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16 <sup>17</sup> AR 635-660.

17 <sup>18</sup> AR 599-613.

18 <sup>19</sup> *Id.*

19 <sup>20</sup> AR 577-598. Per 20 C.F.R. § 404.1520(a)–(g), a five-step evaluation determines  
20 whether a claimant is disabled.

21 <sup>21</sup> AR 584-589.

22 <sup>22</sup> AR 590-591.

1 Caperon to be inconsistent with the objective medical record.<sup>23</sup> As to the sequential  
2 disability analysis, the ALJ found:

- 3 • Step one: Plaintiff last met the insured status requirements of the Act  
4 on December 31, 2016.
- 5 • Also at step one: Plaintiff had not engaged in substantial gainful  
6 activity from her alleged onset date of October 1, 2013, through her  
7 date last insured of December 31, 2016.
- 8 • Step two: Plaintiff had the following medically determinable severe  
9 impairments: erythromelalgia, ear pain, hypertension, GERD, hot  
10 flashes, hyperlipidemia, obesity, and low back pain.

11 Also at step two, the ALJ found that none of Plaintiff's medically determinable  
12 impairments limited her ability to perform any basic work function for 12  
13 consecutive months, and therefore she did not have a severe impairment or  
14 combination of impairments. Thus, the ALJ found that Plaintiff was not under a  
15 disability at any time from the alleged onset date of October 1, 2013, through the  
16 date last insured of December 31, 2016.<sup>24</sup>

17 Plaintiff timely requested review of the ALJ's decision by this Court.<sup>25</sup>

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21<sup>23</sup> AR 589.

22<sup>24</sup> AR 583-592.

23<sup>25</sup> ECF No. 1.

## **II. Standard of Review**

The ALJ's decision is reversed "only if it is not supported by substantial evidence or is based on legal error,"<sup>26</sup> and such error impacted the nondisability determination.<sup>27</sup> Substantial evidence is "more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>28</sup>

### III. Analysis

Plaintiff seeks relief from the denial of disability on several grounds. She argues the ALJ erred by improperly evaluating the medical evidence, erred at step

<sup>26</sup> *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). See 42 U.S.C. § 405(g).

<sup>27</sup> *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) ), superseded on other grounds by 20 C.F.R. § 416.920(a) (recognizing that the court may not reverse an ALJ decision due to a harmless error—one that “is inconsequential to the ultimate nondisability determination”).

<sup>28</sup> *Hill*, 698 F.3d at 1159 (quoting *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)). See also *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court “must consider the entire record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner’s conclusion,” not simply the evidence cited by the ALJ or the parties.) (cleaned up); *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998) (“An ALJ’s failure to cite specific evidence does not indicate that such evidence was not considered[.]”).

1 two by rejecting Plaintiff's impairments as severe and failing to proceed with the  
2 sequential evaluation, erred by improperly evaluating the witness testimony in  
3 violation of the prior Order of this Court, erred when evaluating Plaintiff's  
4 subjective complaints, and erred in failing to conduct a proper analysis at steps  
5 four and five.<sup>29</sup> The Commissioner argues there was no error because at step two  
6 the ALJ reasonably considered the absence of objective medical evidence or  
7 treatment and concluded that Plaintiff did not have a severe impairment.<sup>30</sup> The  
8 Court disagrees with the Commissioner. As is explained below, the ALJ's analysis  
9 contains consequential error.

10 **A. Step Two (Severe Impairment): Plaintiff establishes consequential  
11 error.**

12 Plaintiff argues that the ALJ erred at step two by failing to find her  
13 erythromelalgia and Raynaud's syndrome to be severe impairments and  
14 compounded that error by failing to properly consider the statements of non-  
15 medical sources, as the Court directed in the prior remand Order. The Court  
16 agrees.

17 1. Standard

18 At step two of the sequential process, the ALJ determines whether the  
19 claimant suffers from a "severe" impairment, i.e., one that significantly limits her  
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21 <sup>29</sup> ECF No. 6, p. 7.

22 <sup>30</sup> ECF No. 10, p. 2-3.

1 physical or mental ability to do basic work activities.<sup>31</sup> This involves a two-step  
2 process: 1) determining whether the claimant has a medically determinable  
3 impairment and 2), if so, determining whether the impairment is severe.<sup>32</sup>

4 Neither a claimant's statement of symptoms, nor a diagnosis, nor a medical  
5 opinion sufficiently establishes the existence of an impairment.<sup>33</sup> Rather, "a  
6 physical or mental impairment must be established by objective medical evidence  
7 from an acceptable medical source."<sup>34</sup> Evidence obtained from the "application of a  
8 medically acceptable clinical diagnostic technique, such as evidence of reduced joint  
9 motion, muscle spasm, sensory deficits, or motor disruption" is considered objective  
10 medical evidence.<sup>35</sup> If the objective medical signs and laboratory findings  
11 demonstrate the claimant has a medically determinable impairment,<sup>36</sup> the ALJ

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14 <sup>31</sup> 20 C.F.R. § 404.1520(c).

15 <sup>32</sup> *Id.* § 404.1520(a)(4)(ii).

16 <sup>33</sup> *Id.* § 404.1521.

17 <sup>34</sup> *Id.*

18 <sup>35</sup> 3 Soc. Sec. Law & Prac. § 36:26, Consideration of objective medical evidence (2019).

19 See also 20 C.F.R. § 404.1513(a)(1).

20 <sup>36</sup> "Signs means one or more anatomical, physiological, or psychological  
21 abnormalities that can be observed, apart from [a claimant's] statements  
22 (symptoms)." 20 C.F.R. § 404.1502(l).

1 must then determine whether that impairment is severe.<sup>37</sup>

2       The severity determination is discussed in terms of what is *not* severe.<sup>38</sup> A  
3 medically determinable impairment is not severe if the “medical evidence  
4 establishes only a slight abnormality or a combination of slight abnormalities  
5 which would have no more than a minimal effect on an individual’s ability to  
6 work.”<sup>39</sup> Because step two is simply to screen out weak claims,<sup>40</sup> “[g]reat care  
7 should be exercised in applying the not severe impairment concept.”<sup>41</sup>

8           2.     The ALJ’s Findings

9       Here, the ALJ articulated the following reasoning as to her determination  
10 that Plaintiff’s erythromelalgia was not a severe impairment:

11       Here, as discuss more fully below, there is a complete lack of any  
12 evidence whatsoever related to claimant’s erythromelalgia, a  
13 neurological condition, from the alleged onset date through the date  
14 last insured. And the opinions offered by claimant and referenced by  
15 the District Court (Exhibits 4F and 7F) were from physicians who did  
16 not even first treat claimant until years after the date last insured.  
17 Consequently, the undersigned obtained the testimony of a medical  
18 expert, specializing in neurology to assist in determining whether  
19 there was a basis to infer an onset date prior to the date last insured.  
20 The medical expert (Dr. Frey) explained during her testimony given at  
21 the hearing that the opinions at exhibits 4F and 7F are not supported  
22 by the evidence in this record as existing prior to the date last insured

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23<sup>37</sup> See Soc. Sec. Ruling (SSR) 85-28 at \*3 (1985).

<sup>38</sup> *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996).

<sup>39</sup> *Id.*; see SSR 85-28 at \*3.

<sup>40</sup> *Smolen*, 80 F.3d at 1290.

<sup>41</sup> SSR 85-28 at \*4.

(Hearing Testimony). Moreover as Dr. Frey specifically testified during the hearing, if claimant had the condition of erythromelalgia prior to the date last insured, it was clearly asymptomatic. Next, this record contains multiple visits and medical care during the time period at issue prior to the date last insured, yet the medical evidence of record prior to date last insured fails to even mention complaints of foot pain during the adjudicatory period (Ex. 1F/1, 5F/3, 16, 20, 24, 28, 35, 46, 50, 56). Next, the alleged severity is inconsistent with the claimant's testimony that when "she first quit her job in 2013, she intended to simply rest and regroup" (Hearing Testimony). Additionally, the claimant's testimony that after she again got medical insurance in 2015, two years prior to date last insured, and the doctors "couldn't figure out what it [the problem] was" is a subjective allegation that is not consistent with the objective record, and which is not supported by any objective evidence or medical evidence of record (Hearing Testimony). Indeed, the record contains a general lack of objective evidence that would indicate any mention of these alleged symptoms or problems from her to her doctors. Rather, the claimant's testimony is an inaccurate portrayal as there is a complete absence of any evidence whatsoever that any medical professional was treating her for any related symptoms, or that any treating medical service provider was "trying to figure out" anything since, with no symptoms or complaints by the claimant documented in any record, or any evidence suggesting that the claimant sought treatment for such symptoms or complaints, there was nothing for any doctor to "try to figure out".<sup>42</sup>

3. Relevant Medical Records

On October 8, 2015, Plaintiff presented to Ravinder Samra, MD, with complaints that she was experiencing fatigue, hot flashes, night sweats, and vaginal dryness.<sup>43</sup> It was noted that Plaintiff "also has heat and cold intolerance."<sup>44</sup>

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<sup>42</sup> AR 585-586.

<sup>43</sup> AR 345.

<sup>44</sup> *Id.* Heat and cold intolerance is the primary symptom of Raynaud's disease, a

1 Plaintiff was assessed with antibiotic-induced yeast infection, bronchitis, otalgia of  
2 the right ear, otitis, fever, and an upper respiratory tract infection.<sup>45</sup> Dr. Samra  
3 opined that Plaintiff was in menopause following a hysterectomy.<sup>46</sup> Plaintiff was  
4 given a prescription for an estrogen patch.<sup>47</sup>

5 On January 12, 2016, Plaintiff presented to Ryan Duarte, PA-C, for care for  
6 back pain which she reported had been present for 25 years.<sup>48</sup> She said she  
7 normally relieves the pain with ice packs and over the counter medication but in  
8 the last two weeks it has been worse and she has been experiencing back spasms  
9 and sciatic pain down into the foot.<sup>49</sup> Plaintiff also reported that her GERD was  
10 uncontrolled for the last week.<sup>50</sup> On examination, Plaintiff had positive SLR on the

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12  
13 condition which Plaintiff was diagnosed with in June 2016, prior to her date last  
14 insured. NIH, *What is Raynaud's phenomenon?* [https://www.niams.nih.gov/health-](https://www.niams.nih.gov/health-topics/raynauds-phenomenon/basics/symptoms-causes)  
15 topics/raynauds-phenomenon/basics/symptoms-causes

(last viewed December 16,  
16 2024).

17 <sup>45</sup> AR 345-346.

18 <sup>46</sup> AR 347.

19 <sup>47</sup> AR 348.

20 <sup>48</sup> AR 397.

21 <sup>49</sup> *Id.*

22 <sup>50</sup> *Id.*

1 right, limited flexion at the right hip, and limited range of motion.<sup>51</sup> Blood tests  
2 taken the same day showed low potassium and chloride, as well as high  
3 hemoglobin, hematocrit, white blood count, and neutrophils, as well as positive  
4 indicator of pylori.<sup>52</sup>

5 On February 10, 2016, Plaintiff presented to PA Duarte for follow-up  
6 regarding back pain and GERD.<sup>53</sup> Plaintiff reported that she had suffered right-  
7 sided back pain for 26 years after injuring herself when lifting a heavy object, and  
8 was presently having right-sided sciatic pain.<sup>54</sup> On examination, Plaintiff had full  
9 range of motion and negative straight leg raising but had a positive Hoover test<sup>55</sup>,  
10 and could not extend her back without significant pain.<sup>56</sup> PA Duarte advised that  
11 she would need to see a pain specialist for a prescription for narcotic medication.<sup>57</sup>

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13 <sup>51</sup> AR 399.

14 <sup>52</sup> AR 427-428.

15 <sup>53</sup> AR 392.

16 <sup>54</sup> *Id.*

17 <sup>55</sup> The Hoover's Test is used to differentiate between organic and functional  
18 weakness in the leg and a positive result indicates organic cause. *Hoover's sign:*  
19 *Clinical relevance in Neurology - PubMed* (nih.gov). (last viewed December 16,  
20 2024.)

21 <sup>56</sup> AR 394.

22 <sup>57</sup> AR 395.

1 On June 2, 2016, Plaintiff presented to Bonnie Davis, MD, of Lourdes West  
2 Pasco Family Practice Clinic to establish care with Dr. Davis after PA Duarte  
3 stated that she needed an MD to prescribe.<sup>58</sup> Plaintiff requested refills of  
4 lorazepam and tramadol which she had been prescribed for insomnia and back  
5 pain.<sup>59</sup> Dr. Davis assessed hypertension, GERD, chronic back pain, insomnia, and  
6 Raynaud's syndrome.<sup>60</sup>

7 On July 31, 2017, Plaintiff presented to Eyob Kidana, PA-C, with complaints  
8 that her left foot was swollen and burning for the last 5 days.<sup>61</sup> Plaintiff reported  
9 that the symptoms started after she felt a sting on her foot and said she thought  
10 she was stung by a spider.<sup>62</sup> PA-C Kidana assessed cellulitis of the left foot and  
11 prescribed antibiotics and antihistamines.<sup>63</sup>

12 On August 8, 2017, Plaintiff presented to Dr. Davis for a follow-up regarding  
13 left foot cellulitis after a suspected spider bite.<sup>64</sup> Plaintiff also complained that an  
14 erythematous rash she had on her upper arms for "many years" was now spreading

15 \_\_\_\_\_  
16 <sup>58</sup> AR 388.

17 <sup>59</sup> *Id.*

18 <sup>60</sup> AR 390.

19 <sup>61</sup> AR 385

20 <sup>62</sup> *Id.*

21 <sup>63</sup> AR 387.

22 <sup>64</sup> AR 381.

1 to her chest and hands.<sup>65</sup> On examination, Dr. Davis noted a discoloration over  
2 bilateral hands, upper arms, and chest, and noted that although Plaintiff still  
3 walked with a limp, swelling in the left foot was markedly decreased.<sup>66</sup> Dr. Davis  
4 assessed cellulitis of the foot and atypical rash.<sup>67</sup>

5 On September 8, 2017, Plaintiff was seen by Dr. Davis for an annual  
6 physical.<sup>68</sup> Plaintiff's active conditions were chronic back pain, GERD, history of  
7 goiter, menopausal hot flashes, hypertension, insomnia, and Raynaud's  
8 syndrome.<sup>69</sup> On examination, all of Plaintiff's results were within normal range.<sup>70</sup>

9 On June 13, 2018, Plaintiff presented to the Lourdes West Pasco Family  
10 Practice Clinic, with complaints that for the last several years her feet had been  
11 turning bright red and burning off and on for several years.<sup>71</sup> Plaintiff reported  
12 that the burning in her feet affected her sleep and felt similar to the Raynaud's in  
13 her hands.<sup>72</sup> On examination, Dr. David found that Plaintiff's feet were "bright red

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15<sup>65</sup> *Id.*

16<sup>66</sup> AR 383.

17<sup>67</sup> *Id.*

18<sup>68</sup> AR 407.

19<sup>69</sup> AR 408.

20<sup>70</sup> AR 409-410.

21<sup>71</sup> AR 377.

22<sup>72</sup> *Id.*

1 and tender bilaterally in what appears to be some sort of rheumatologic or  
2 inflammatory reaction.”<sup>73</sup> Dr. Davis prescribed gabapentin to alleviate the burning  
3 sensation.<sup>74</sup>

4 On July 23, 2018, Plaintiff was examined by Dr. Davis for bilateral foot pain,  
5 with her feet turning bright red and having a burning sensation.<sup>75</sup> Dr. Davis noted  
6 that Plaintiff was referred to both a rheumatologist and a podiatrist and that  
7 gabapentin provided relief but left Plaintiff fatigued.<sup>76</sup>

8 On August 29, 2018, Plaintiff presented to Dr. Davis with complaints of  
9 severe foot pain which was making her frustrated and very depressed.<sup>77</sup> On  
10 examination, Plaintiff had bright red feet, which were tender to light touch, and  
11 was frustrated and tearful.<sup>78</sup> Dr. Davis assessed bilateral foot pain, Raynaud’s  
12 syndrome, discoloration of the skin on the foot, chronic back pain, and a history of  
13 tobacco abuse.<sup>79</sup> She prescribed tramadol and referred Plaintiff to a podiatrist.<sup>80</sup>

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15 <sup>73</sup> AR 379.

16 <sup>74</sup> AR 380.

17 <sup>75</sup> AR 370.

18 <sup>76</sup> *Id.*

19 <sup>77</sup> AR 366.

20 <sup>78</sup> AR 368.

21 <sup>79</sup> AR 369.

22 <sup>80</sup> *Id.*

1 On September 5, 2018, Plaintiff presented to Dr. Davis for follow-up for  
2 chronic back and bilateral foot pain.<sup>81</sup> Dr. Davis noted that Plaintiff had been  
3 under a pain contract for 3 years and was taking 50 mg of Tramadol 3 times a  
4 day.<sup>82</sup> On examination, Plaintiff's gait was abnormal due to bilateral foot pain, and  
5 her feet were bright red.<sup>83</sup>

6 On October 3, 2018, Plaintiff presented to Dr. Davis for follow-up regarding  
7 foot pain.<sup>84</sup> She noted that rheumatologist Dr. Thappa had recently diagnosed  
8 Plaintiff's foot condition and began treatment.<sup>85</sup> On examination, Dr. Davis noted  
9 that Plaintiff was able to walk easier and that Plaintiff's feet were red, but  
10 "considerably better" than when seen previously.<sup>86</sup> Dr. Davis assessed  
11 erythromelalgia, bilateral foot pain, chronic back pain, and Raynaud's syndrome.<sup>87</sup>

12 On October 11, 2018, Plaintiff was seen for her annual physical by  
13 Dr. Davis.<sup>88</sup> It was noted that Plaintiff suffered paresthesias and had the active

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15 <sup>81</sup> AR 362.

16 <sup>82</sup> *Id.*

17 <sup>83</sup> AR 364.

18 <sup>84</sup> AR 358.

19 <sup>85</sup> *Id.*

20 <sup>86</sup> AR 360.

21 <sup>87</sup> AR 361.

22 <sup>88</sup> AR 402.

problems of bilateral foot pain, chronic back pain, discoloration of the skin on her foot, erythromelalgia, GERD, high risk medication use, history of goiter, menopausal hot flashes, hypertension, insomnia, and Raynaud's syndrome.<sup>89</sup> On examination it was noted that the skin of Plaintiff's feet was bright red.<sup>90</sup> On April 29, 2019, Plaintiff presented to Michael Adling, DO, to establish care.<sup>91</sup> Dr. Adling noted that Plaintiff had both Raynaud's syndrome and erythromelalgia and was being followed by rheumatology.<sup>92</sup>

#### 4. Relevant Third-Party Witness Statements

Plaintiff submitted a written statement from her former employer and a separate written statement from her friend.

a. Teresa Caperon

On March 1, 2021, Teresa Caperon, the co-owner of Ventco, LLC, an electrical contracting company for which Plaintiff worked from 2006-2013,<sup>93</sup> submitted a third-party statement.<sup>94</sup> She stated that she met Plaintiff in 2006

89 AR 403.

90 AR 405.

91 AR 429.

92 AR 430.

<sup>93</sup> See detailed earnings record at AR 215-216.

94 AR 301.

1 when she came to work at her company.<sup>95</sup> In pertinent part, Ms. Caperon stated:

2       In 2011 I noticed that her toes were bright red and asked her what wa  
3       sgoing on with her feet. She complained that they were burning a lot.  
4       Sometimes it was just her toes and other times it might be an entire  
5       foot. When I asked her what she thought the problem was, she said  
6       that maybe she was eating too much salty food or maybe it had  
7       something to do with her blood pressure issues. As time went on, I  
8       observed it getting worse and that her feet were swollen and flaring  
9       up more and more often.

10      By 2013 she was really having trouble walking around and even sittin  
11       gwas very uncomfortable. Her hands were giving her trouble as well.  
12       Shecomplained of numbness and burning in her fingers when she was  
13       typing, filing, etc. She went to see her doctor and was told she had  
14       Reynouds disease but the medication didn't seem to help. She came to  
15       work looking tired and was having trouble concentrating and  
16       remembering things. It became more difficult to complete her many  
17       tasks.

18      When she quit we all agreed that she was making a good decision for  
19       her health at that time. We were very sorry to lose a valued employee.

20       <sup>96</sup>

21           b. Johanna Merritt

22      On January 25, 2021, Plaintiff's friend Johanna Merritt submitted a third-  
23       party statement.<sup>97</sup> Ms. Merritt wrote that she met Plaintiff in 2008 and that at  
24       that time Plaintiff was working as an office manager for an electrical company.<sup>98</sup>  
25       She wrote that she saw a decline in Plaintiff's health in 2011, when Plaintiff

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26       <sup>95</sup> *Id.*

27       <sup>96</sup> *Id.*

28       <sup>97</sup> AR 296.

29       <sup>98</sup> *Id.*

complained that her feet burned and that when Plaintiff left her job her hands and feet had become swollen and red.<sup>99</sup> She stated:

As the years have gone on I have seen more and more of a decline in her health. The pain has become intolerable for her. She was very active before this all started and year by year her activity level has increasingly declined to a point where she has become house bound. This not only affected her physically but emotionally and mentally not being able to do normal everyday things has certainly taken a toll on her. She goes to the doctor when necessary and that's about it. She cannot clean her house and even something that people take for granted like ashower creates great difficulty and pain. I have witnessed a vibrant, vivacious, hard working woman transform into a ghost of herself and itis quite sad. I do hope that this will give a little snapshot into her disability for you.<sup>100</sup>

## 5. The Court's Prior Order

In its prior Order, the Court addressed the ALJ's finding at step two that Plaintiff's erythromelalgia was not severe, stating:

It is already established that Plaintiff currently suffers from the severe medically determinable impairment of erythromelalgia; it is also established that her current symptoms are so severe as to render her disabled under the Act.<sup>63</sup> The point of contention, and what the ALJ should have determined when conducting the step-two analysis, is *when* Plaintiff became disabled.<sup>101</sup>

The Court went on to note that:

Here, if the ALJ were unable to reasonably infer Plaintiff's onset date from the medical evidence, the record nonetheless contained highly

99 *Id.*

100 *Id*

101 AR 651

1 probative evidence from non-medical sources.<sup>102</sup>

2 The Court noted that the statement of Plaintiff's former employer detailing  
3 symptoms she witnessed between 2011 and the time of Plaintiff's resigning from  
4 her job for health reasons in 2013.<sup>103</sup> The Court went on to state:

5 The ALJ rejected this evidence largely because of a "lack of any medical  
6 evidence of hand/foot pain through the date last insured." This, despite  
7 the Commissioner recognizing that such lay statements can be of  
8 particular importance in this context precisely *because of* the dearth of  
9 medical evidence speaking to the onset date of Plaintiff's established  
10 severe impairment.<sup>104</sup>

11 The Court cited SSR 18-01p, as well as case law, which provides that "The  
12 fact that lay testimony and third-party function reports may offer a different  
13 perspective than medical records alone is precisely why such evidence is valuable  
14 at a hearing."<sup>105</sup>

15 In its Order, the Court directed that on remand the ALJ was to establish the  
16 date on which Plaintiff's erythromelalgia became severe and directed that the ALJ  
17 reconsider the witness statements of Johanna Merritt and Teresa Caperon and  
18 more fully articulate her reasoning:

19 In determining Plaintiff's onset date, to allow for meaningful court  
20 review, the ALJ shall carefully—and expressly—consider the lay

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21<sup>102</sup> AR 653.

22<sup>103</sup> *Id.*

23<sup>104</sup> AR 653-654.

<sup>105</sup> *Diedrich v. Berryhill*, 874 F.3d 634, 640 (9th Cir. 2017).

1 statements of Plaintiff's former coworker and former employer, found  
2 at AR 296 and 301, respectively. If the ALJ again rejects these  
3 statements, the ALJ should not rely on a mere absence of  
corroborating medical evidence in the record, and the ALJ shall  
articulate valid reasons for rejecting such compelling evidence.<sup>106</sup>

4 6. Analysis

5 The ALJ's articulated reasoning regarding her consideration of the witness  
6 statements provided by Teresa Caperon and Johanna Merrit was based primarily  
7 upon her finding that the statements were inconsistent with the objective medical  
8 record.<sup>107</sup> The ALJ additionally noted that neither Johanna Merritt nor Teresa  
9 Caperon had a role in the care or evaluation of Plaintiff and had not reviewed her  
10 medical records, so their statements were based on casual observations.<sup>108</sup>  
11 Additionally, the ALJ stated elsewhere in the decision that the statements were  
12 unreliable because “[t]he accuracy of the recollection of observations occurring 10  
13 years earlier, is questionable and does not overcome or outweigh the totality of the  
14 other evidence.”<sup>109</sup>

15 The Court concludes that the ALJ repeated her error of failing to view the  
16 statements as evidence that might fill gaps in the record and instead focused on  
17 the lack of objective medicals. This is contrary to the Court's ruling and the law it  
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19 <sup>106</sup> AR 659.

20 <sup>107</sup> AR 589-590.

21 <sup>108</sup> AR 590.

22 <sup>109</sup> AR 587.

1 cited.<sup>110</sup>

2       The Court finds that the ALJ's consideration of the two statements remains  
3 deficient, particularly with regard to the testimony of Teresa Caperon. Ms.  
4 Caperon was not simply a "friend" of Plaintiff's, but rather was her employer for  
5 seven years between 2006 and 2013.<sup>111</sup> The testimony of a former employer is of  
6 special relevance in a case such as this, where the nature of Plaintiff's condition at  
7 the time she left her employment was in question. It was Ms. Caperon's statement  
8 that in 2011 she personally observed that not all of Plaintiff's feet, but her toes,  
9 were bright red.<sup>112</sup> Additionally, Ms. Caperon stated that Plaintiff complained of  
10 numbness and burning in her hands when she was typing and filing and that she  
11 saw a doctor for her Raynaud's syndrome, but it did not improve.<sup>113</sup>

12       There is significance in Ms. Caperon's statement regarding the discoloration  
13 in Plaintiff's toes because the record clearly establishes that Plaintiff became  
14 disabled from a progressive disease which affects her feet. It is likely that the  
15 information provided by Ms. Caperon that Plaintiff's toes displayed symptoms of  
16 the condition in 2011 would have been helpful to Dr. Frey in tracking the

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19<sup>110</sup> See *Diedrich*, 874 F.3d at 639; SSR 18-01p,

20<sup>111</sup> AR 217-218.

21<sup>112</sup> AR 301.

22<sup>113</sup> *Id.*

1 | progression of the condition.

2 While the ALJ’s assertion that Johanna Merritt’s recollection in 2021 of her  
3 observations in 2013 might be somewhat distorted by time may be correct, the  
4 likelihood that Ms. Caperon did not clearly remember the time frame she spoke of  
5 is much less probable. Ms. Caperon was stating the fact that Plaintiff was a valued  
6 employee who left her position due to medical issues.<sup>114</sup> There is no question that  
7 the events Ms. Caperon spoke of happened in or prior to 2013. While it is possible  
8 that Ms. Merritt has incorrectly recalled her observations of Plaintiff in 2018 and  
9 believed them to have been made at an earlier date, Ms. Caperon’s recollections are  
10 of the events of date certain and cannot be questioned in the same manner.

11           Additionally, Ms. Caperon's statement has probative value because it  
12 provides observations regarding Plaintiff's ability to engage in work functions. The  
13 Social Security Administration has recognized that in cases where development of  
14 the record is necessary a statement from a former employer regarding the  
15 applicant's function should be requested and has created a form, Report of Adult  
16 Functioning – Employer.<sup>115</sup>

17 By characterizing Ms. Caperon's statement as that of a "friend," the ALJ  
18 failed to consider that the relationship was a professional one and that  
19 Ms. Caperon was in a unique position to provide evidence regarding Plaintiff's

114 AR 301.

<sup>115</sup> See, Form SSA-3385, POMS DI 43520.001.

1 ability to function. The ALJ was required to consider not only the nature but also  
2 the extent of Ms. Caperon's relationship to Plaintiff when assessing her  
3 statement.<sup>116</sup> The ALJ failed to consider that as Plaintiff's employer Ms. Caperon  
4 was able to observe Plaintiff's ability to function in the workplace on a daily basis.

5 "Testimony by a lay witness provides an important source of information  
6 about a claimant's impairments, and an ALJ can reject it only by giving specific  
7 reasons germane to each witness."<sup>117</sup> If an ALJ fails to properly discuss favorable  
8 competent lay testimony, this error is not harmless unless the reviewing court can  
9 "confidently conclude that no reasonable ALJ, when fully crediting the testimony,  
10 could have reached a different disability determination."<sup>118</sup>

11 The error was consequential because the ALJ limited her analysis to the  
12 first two steps of the five-step evaluation and did not complete it. The Court  
13 concludes that the case should be remanded and the ALJ should be directed to  
14 consider all evidence of Plaintiff's impairments.

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<sup>116</sup> Titles II & XVI: Considering Opinions & Other Evidence from Sources Who Are  
18 Not "Acceptable Med. Sources" in Disability Claims; Considering Decisions on  
19 Disability by Other Governmental & Nongovernmental Agencies, SSR 06-03P  
20 (S.S.A. Aug. 9, 2006).

21<sup>117</sup> *Regennitter v. Comm'r*, 166 F.3d 1294, 1298 (9th Cir. 1999).

22<sup>118</sup> *Stout v. Comm'r*, 454 F.3d 1050, 1056 (9th Cir. 2006).

1       **B. Medical Opinions: Plaintiff established consequential error.**

2           Plaintiff argues the ALJ erred in relying upon the testimony of the medical  
3 expert, Dr. Frey. Although the Court has remanded the case for consideration of  
4 the written testimony of Teresa Caperon, Plaintiff's former employer, it will  
5 address this issue to provide guidance in later proceedings.

6           Plaintiff argues that the ALJ erred in relying upon Dr. Frey's opinions. The  
7 Court concludes that the ALJ did err in relying on Dr. Frey's opinions because the  
8 ALJ's error above resulted in Dr. Frey's inability to base her opinion on all the  
9 relevant facts.

10          1.       Dr. Frey's testimony

11           The following exchange took place on the record between the ALJ and  
12 Dr. Frey:<sup>119</sup>

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<sup>119</sup> AR 604.  
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1           Q Okay. In these records, it looks like the only records  
2 from the date last insured and prior are contained in Exhibits 1F  
3 and 5F. I know that there were a couple of places, I believe, in  
4 2017 -- nope maybe it was 2018, 2018, where she talked about  
5 swelling and redness in her feet, or her limbs. I didn't see  
6 anything with regards to her hands. Did you see any complaints of  
7 limb redness, warmth or burning in any of her limbs prior to  
8 December 31<sup>st</sup> of 2016?

9           A I can say that's when she presented to the physician who  
10 diagnosed her Erythromelalgia. She reported that the symptoms went  
11 back, at least in her feet, to 2010.

12           Q Correct. She did report that.

13           A Yeah.

14           Q But --

15           A Yeah.

16           Q -- under Social Security regulations, we cannot make a  
17 finding that a condition existed or was disabling based on  
18 claimant's reports alone. There has to be medical signs and  
19 symptoms to establish the condition. And so, that's why I'm asking  
20 you, was there anything in the medical records prior to the date  
21 last insured that in your opinion, and with your knowledge of the  
22 condition, established the existence of the condition?

23           A No, Your Honor. There was not.

The exchange continued as follows:<sup>120</sup>

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120 AR 605.

1 Q Does the fact that she was diagnosed with the condition --  
2 well, let's put it this way. Does the fact that she reported the  
3 symptoms in 2018 and was diagnosed with the condition subsequently,  
4 on a more probable than not basis, establish that the condition in  
fact existed on or before December 31<sup>st</sup>, 2016?

5 A That would be just based on her report that we can do that.

6 Q Okay. But there's nothing in the medical record that would  
establish that on a more probable than not basis?

7 A That's -- that is correct.

8 Q And as a -- well, let me -- how am I going to ask this  
question? I don't know how to ask it. As a physician, can you say  
9 on a more probable than not basis that it did, in fact, exist?

10 A I cannot say that on a more probable than not basis.

11 Q Okay.

12 A I really -- I only have her report to go on.

13 Following that exchange, Dr. Frey was questioned by Plaintiff's attorney as  
14 to whether erythromelalgia was commonly misdiagnosed as Raynaud's disease and  
15 he responded that it is possible.<sup>121</sup>

16 Plaintiff's attorney then read from Ms. Caperon's statement citing to swollen  
17 feet, and sometimes numbness and burning in the fingers when typing and asked if  
18 this was consistent with the condition, to which Dr. Frey responded it was and that  
19 it was a progressive condition that worsens over time and that it typically affects

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<sup>121</sup> AR 605-606.

1 | the hands and feet.<sup>122</sup>

The ALJ then asked Dr. Frey if it was probable that a person experiencing symptoms as painful and disabling as this condition would report symptoms to their doctor and Dr. Frey responded that it would be fair to say they would report pain if it was disabling.<sup>123</sup>

## 2. Medical records

7 The Court recited the relevant treatment notes from the medical record  
8 when rendering it's finding as to the ALJ's error at step two. Those records are  
9 incorporated by reference.

### 3. Standard

The ALJ must consider and articulate how persuasive she found each medical opinion and prior administrative medical finding, including whether the medical opinion or finding was consistent with and supported by the record.<sup>124</sup> The factors for evaluating the persuasiveness of medical opinions include, but are not limited to, supportability, consistency, relationship with the claimant, and specialization.<sup>125</sup> Supportability and consistency are the most important factors.<sup>126</sup>

122 AR 606-607.

123 AR 607.

<sup>124</sup> 20 C.F.R. § 404.1520c; *Woods v. Kijakazi*, 32 F.4th 785, 792 (9th Cir. 2022).

<sup>125</sup> 20 C.F.R. § 404.1520c(c)(1)-(5).

<sup>126</sup> 20 C.F.R. § 404.1520c(b)(2).

1 When considering the ALJ's findings, the Court is constrained to the reasons  
2 offered by the ALJ.<sup>127</sup>

3       4.     Analysis

4       Plaintiff argues that the ALJ erred in relying upon Dr. Frey's opinion that  
5 Plaintiff did not have a severe impairment and mischaracterized Dr. Frey's  
6 testimony by failing to acknowledge Dr. Frey's testimony that the symptoms  
7 described by Teresa Caperon were consistent with Plaintiff's condition. The  
8 Commissioner argues that Plaintiff has not challenged Dr. Frey's testimony with  
9 any level of specificity and errs in stating that the ALJ mischaracterized Dr. Frey's  
10 testimony. The Court concludes that Plaintiff did challenge Dr. Frey's testimony  
11 with specificity, although she has defined the objection to be the ALJ's  
12 "mischaracterization" of Dr. Frey's testimony, rather than a failure to acknowledge  
13 that Dr. Frey, when advised of the probative evidence improperly discounted as  
14 explained above, stated that it was consistent with the effects of the condition and  
15 its progression.

16       While Plaintiff was incorrect in calling the ALJ's error a mischaracterization  
17 of Dr. Frey's testimony, her underlying argument is sound. The Court agrees that  
18 the ALJ erred in relying on the testimony of Dr. Frey that the medical records  
19 contain no contemporaneous reports consistent with erythromelalgia but failing to  
20 address Dr. Frey's subsequent testimony that symptoms observed and testified to

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<sup>127</sup> See *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014).  
23

1 by Plaintiff's former employer were consistent with the condition.

2 **C. Symptom Reports: The Court Finds the Issue Moot**

3 Plaintiff argues the ALJ failed to properly assess her subjective complaints.  
4 As discussed above, the ALJ erred at step two and failed to properly evaluate the  
5 medical opinions. Because the ALJ's erroneous evaluation of the third-party  
6 witness testimony and medical evidence, and the medical opinions impacted her  
7 evaluation of the Plaintiff's subjective reports, the ALJ is to reevaluate Plaintiff's  
8 symptom reports on remand.

9 **D. Remand for Further Proceedings**

10 Plaintiff submits a remand for payment of benefits is warranted. The  
11 decision whether to remand a case for additional evidence, or simply to award  
12 benefits, is within the discretion of the court.”<sup>128</sup> When the court reverses an ALJ’s  
13 decision for error, the court “ordinarily must remand to the agency for further  
14 proceedings.”<sup>129</sup>

15 The record here, as developed on remand, fails to resolve the issues for  
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17 <sup>128</sup> *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*,  
18 761 F.2d 530 (9th Cir. 1985)).

19 <sup>129</sup> *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke* 379 F.3d at 595  
20 (“[T]he proper course, except in rare circumstances, is to remand to the agency for  
21 additional investigation or explanation”); *Treichler v. Comm'r of Soc. Sec. Admin.*,  
22 775 F.3d 1090, 1099 (9th Cir. 2014).

1 which the Court remanded the case. While the third-party statement of  
2 Ms. Caperon supports a finding that some symptoms consistent with Plaintiff's  
3 condition were established as early as 2011, it does not resolve the question of  
4 when the condition became disabling. The Court finds that further development is  
5 necessary for a proper disability determination.

6 **IV. Conclusion**

7 Accordingly, **IT IS HEREBY ORDERED:**

8 1. The ALJ's nondisability decision is **REVERSED**, and this matter is  
9 **REMANDED** to the Commissioner of Social Security for further  
10 proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

11 2. On remand, the ALJ shall conduct anew the disability evaluation,  
12 beginning at step two, subject to the following instructions:

13 a. To assist the ALJ (as well as any reviewing court) in  
14 understanding Plaintiff's conditions, interpreting the medical  
15 evidence, and ascertaining the progression of Plaintiff's  
16 impairment(s), the ALJ shall obtain medical-expert testimony  
17 from an expert well versed in erythromelalgia.

18 b. At step two, consistent with SSR 18-01p, the ALJ shall  
19 determine the first date on which Plaintiff met the statutory  
20 definition of disability. As part of this analysis, the ALJ must  
21 ascertain and expressly address whether Plaintiff's  
22 erythromelalgia and/or Raynaud's syndrome became severe by

1 December 31, 2016. If Plaintiff had a severe medical  
2 impairment by December 31, 2016, the ALJ shall proceed with  
3 the remaining disability-assessment steps as appropriate.

4 c. In determining Plaintiff's onset date, to allow for meaningful  
5 court review, the ALJ shall carefully and expressly consider the  
6 lay statements of Plaintiff's former coworker and former  
7 employer, found at AR 296 and 301, respectively. If the ALJ  
8 again rejects these statements, the ALJ should not rely on a  
9 mere absence of corroborating medical evidence in the record,  
10 and the ALJ shall articulate valid reasons for rejecting such  
11 compelling evidence.

12 d. The ALJ shall further develop the record if she deems it  
13 necessary.

14 3. The Clerk's Office shall **TERM** the parties' briefs, **ECF Nos. 6 and**  
15 **10**, enter **JUDGMENT** in favor of **Plaintiff**, and **CLOSE** the case.

16 IT IS SO ORDERED. The Clerk's Office is directed to file this order and  
17 provide copies to all counsel.

18 DATED this 9<sup>th</sup> day of January, 2025.

19 

20 \_\_\_\_\_  
21 EDWARD F. SHEA  
22 Senior United States District Judge  
23